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14
15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

17 CARL ZEISS MEDITEC, INC.,

18 Plaintiff,

19 v.

20 TOPCON MEDICAL SYSTEMS, INC.,
TOPCON HEALTHCARE SOLUTIONS,
21 INC., TOPCON CORPORATION, TOBIAS
KURZKE, GREG HOFFMEYER,
22 GENEVIEVE FAY, KATALIN SPENCER,
KEITH BROCK, CHARLES GUIBORD, JR.,
23 JOSEPH CICCANESE, AND MICHAEL
CHEN,

24 Defendants.
25
26

Case No. 4:19-cv-04162-SBA

**PLAINTIFF'S NOTICE OF RENEWED
MOTION AND RENEWED MOTION
FOR PRELIMINARY INJUNCTION**

Date: March 11, 2020
Time: 2:00 p.m.
Location: Oakland Courthouse
1301 Clay Street
Oakland, CA 94612

27 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**
28

1 **TO: THE HONORABLE JUDGE SAUNDRA BROWN ARMSTRONG, UNITED STATES**
2 **DISTRICT JUDGE AND ALL PARTIES IN INTEREST AND THEIR ATTORNEYS**
3 **OF RECORD:**

4 **PLEASE TAKE NOTICE** that on March 11, 2020 at 2:00pm or as soon as the Court can
5 hear, Plaintiff Carl Zeiss Meditec, Inc. ("CZMI") will move, before the Honorable Judge Sandra
6 Brown Armstrong of the United States District Court for the Northern District of California, located
7 at 1301 Clay Street, Oakland, California 94612, for a preliminary injunction against Defendants
8 Topcon Medical Systems, Inc. ("TMS"), Topcon Healthcare Solutions, Inc. ("THS"), and Topcon
9 Corporation (collectively "Topcon"), and Tobias Kurzke (collectively "Defendants") pursuant to
10 Federal Rule of Civil Procedure 65-2.

11 CZMI renews its motion for preliminary injunction on the basis of new, critical factual
12 developments in this case. [REDACTED]

13 [REDACTED] After months of stonewalling, the existence
14 of these files was not disclosed until January 13, 2020. Defendants failed to produce any
15 documents from this trove of stolen information until two weeks ago. Production of the files is
16 ongoing and the full extent of Mr. Kurzke and Topcon's unlawful activity is yet to be determined.

17 However, we know that immediate injunctive relief is the only available remedy to prevent
18 the imminent injury that will result if Topcon is permitted to launch [REDACTED]
19 [REDACTED] using stolen confidential, proprietary and trade secret information. The parties
20 have just begun fact discovery, and – already – the revelations demonstrate that CZMI is highly
21 likely to succeed on the merits. Issuing a narrowly tailored preliminary injunction at this stage
22 serves the public interest of protecting trade secrets, while preventing imminent and irreparable
23 harm to CZMI. Moreover, an injunction poses no risk of prejudice to Topcon — who has elected
24 not to make any effort to stop or otherwise curtail trade secret appropriation (by at least one
25 employee) that it has direct knowledge of.

26 In light of these facts, preliminary relief is consistent with the spirit of both the Defend Trade
27 Secrets Act of 2016 ("DTSA") and the California Uniform Trade Secrets Act ("CUTSA"), which
28 exist to prevent the very harm that threatens to irreparably injure CZMI here. CZMI respectfully

1 requests a preliminary injunction be issued in accordance with the DTSA, CUTSA, California law,
2 Federal Rule of Civil Procedure 65, this notice of motion, the accompanying memorandum of
3 points and authorities, the Declarations of Jeremy T. Elman (including Exhibits 1-2 filed under
4 seal), the Third Amended Complaint, all other pleadings filed in this action, and any arguments
5 made before the Court.

6 Respectfully submitted,

7 Dated: February 5, 2020

WHITE & CASE LLP

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9 By: /s/ Jeremy T. Elman

JEREMY T. ELMAN

Attorneys for Plaintiff

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TABLE OF CONTENTS

I. INTRODUCTION1

II. FACTUAL BACKGROUND.....2

III. LEGAL STANDARD.....4

LEGAL ARGUMENT5

 A. CZMI Is Likely to Succeed on the Merits of Showing Trade Secret
 Misappropriation and Breach of Contract..... 5

 B. CZMI Will Suffer Irreparable Harm..... 9

 C. The Balance of Hardships Strongly Favors CZMI 10

 D. The Public Interest Favors CZMI 11

IV. INJUNCTION BOND11

V. CONCLUSION.....12

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Alta Devices, Inc. v. LG Elecs, Inc.</i> , 343 F. Supp. 3d 868 (N.D. Cal. 2018)	6
<i>Autodesk, Inc. v. Zwcad Software Co.</i> , No. 5:14-cv-01409, 2015 U.S. Dist. LEXIS 63610 (N.D. Cal. March 15, 2018).....	6
<i>Bank of America, N.A. v. Lee</i> , No. CV 08-5546 CAS, 2008 U.S. Dist. LEXIS 110410 (C.D. Cal. Sept. 22, 2008)	11
<i>Brocade Commc'ns Sys., Inc. v. A10 Networks, Inc.</i> , 873 F. Supp. 2d 1192 (N.D. Cal. 2012)	6
<i>Comet Tech. USA, Inc. v. Beuerman</i> , No. 18-cv-01441-LHK, 2018 U.S. Dist. LEXIS 224356 (N.D. Cal. March 15, 2018)	7, 8, 10, 11
<i>Eldorado Stone LLC v. Renaissance Stone, Inc. Case No. 04cv2562 JM(LSP)</i> , 2005 U.S. Dist. LEXIS 45238, 2005 U.S. Dist. LEXIS 45238 (S.D. Cal. May 31, 2005)	9
<i>Henry Schein, Inc. v. Cook</i> , 191 F. Supp. 3d 1072 (N.D. Cal. 2016)	10, 11
<i>Jorgensen v. Cassidy</i> , 320 F.3d 906, 919 (9th Cir. 2003).....	11
<i>Lamb-Weston, Inc. v. McCain Foods, Ltd.</i> , 941 F.2d 970 (9th Cir. 1991)	10
<i>Lillge v. Verity</i> , Case No. C 07-2748 MHP, 2007 U.S. Dist. LEXIS 73543 (N.D. Cal. Oct. 1, 2007)	9
<i>Posdata Co. v. Seyoung Kim</i> , Case No. C-07-02504 RMW, 2007 U.S. Dist. LEXIS 48359 (N.D. Cal. 2007)	9
<i>Pyro Spectaculars North, Inc. v. Souza</i> , 861 F. Supp. 2d 1079 (E.D. Cal. 2012).....	10, 11
<i>Rockwell Collins, Inc. v. Wallace</i> , Case No. SACV 17-01369 AG, 2017 U.S. Dist. LEXIS 190361 (C.D. Cal. Nov. 10, 2017)	6
<i>Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.</i> , 240 F.3d 832 (9th Cir. 2001)	10

1	<i>TMX Funding, Inc. v. Impero Techs., Inc.</i> ,	
2	No. C 10-00202 JF (PVT), 2010 U.S. Dist. LEXIS 60260 (N.D. Cal. June 8,	
	2010)	6
3	<i>Waymo LLC v. Uber Techs., Inc.</i> ,	
4	No. C 17-00939 WHA, 2017 U.S. Dist. LEXIS 73843 (N.D. Cal. May 11, 2017)	
	5, 9, 10
5	<i>Western Directories, Inc. v. Golden Guide Directors, Inc.</i> ,	
6	No. C 09-1625 CW, 2009	9
7	Other Authorities	
8	Fed R. Civ. P. 65(c)	11
9		
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1 **I. INTRODUCTION**

2 Topcon must not be permitted to launch [REDACTED] Defendants
3 reached this stage of development of its competing ODx software product through unlawful means.
4 Topcon orchestrated a scheme to solicit the Former Employees, most notably Mr. Kurzke, to join
5 Topcon and develop products to compete in the small and highly technical ophthalmic industry.
6 Then, to make up for CZMI's many years of expensive, time-consuming research and development
7 head start, Topcon decided to cheat. It poached Mr. Kurzke and other former CZMI employees
8 with CZMI proprietary, confidential and trade secret information ("CZMI Trade Secrets") regarding
9 its ODx software products. Now, Topcon is mere months from launching its unlawfully developed
10 product using this stolen information. This must be stopped.

11 Courts in this District routinely grant preliminary injunctive relief when former employees
12 steal confidential files to assist a competitor under strikingly similar circumstances. *See Weride*
13 *Corp v. Huang*, 379 F. Supp. 3d 834, 845 (N.D. Cal. 2019) (granting injunction when defendant
14 downloaded files to a personal storage device); *Comet Techs. USA, Inc. v. Beuerman*, No. 18-cv-
15 01441-LHK, 2018 U.S. Dist. LEXIS 224356, at *12-13 (N.D. Cal. March 15, 2018) (same); *Henry*
16 *Schein, Inc. v. Cook*, 191 F. Supp. 3d 1072, 1077 (N.D. Cal. 2016) (same). This case is no
17 exception.

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 The time is ripe to enjoin Defendants. Even limited discovery has revealed that Mr. Kurzke
26 and other former CZMI employees regularly disclose CZMI Trade Secrets to Topcon to accelerate
27 development of directly competing products. This includes, but is not limited to, [REDACTED]
28 [REDACTED]. *See Kurzke Dep. Tr. (excerpts)*, Dkt. 127-5 (provisionally

1 filed under seal) (Mr. Kurzke testified that he looked at files on the Kurzke Hard Drive after leaving
2 CZMI to acquire [REDACTED]
3 [REDACTED]
4 [REDACTED] Defendants have only disclosed an initial production, but it has
5 revealed enough already.

6 The Court must enjoin Topcon before it is too late. Topcon's first of many potential products
7 to misappropriate CZMI Trade Secrets [REDACTED] To
8 prevent irreparable injury to Topcon and the entire ophthalmic industry, CZMI requests that the Court
9 issue an injunction: 1) preventing Mr. Kurzke and any former CZMI employee from disclosing CZMI
10 Trade Secrets; 2) ordering the immediate return of all stolen CZMI Trade Secret information to CZMI,
11 including but not limited to the Kurzke Hard Drive and all duplicates, copies, or replications of files
12 therein; 3) enjoining Defendants [REDACTED]
13 [REDACTED] potentially misappropriating CZMI Trade Secrets, until at least
14 resolution of this dispute. CZMI further requests any additional or alternative relief the Court may
15 deem appropriate.

16 **II. FACTUAL BACKGROUND**

17 For brevity, CZMI incorporates by reference all of the factual allegations in the Third
18 Amended Complaint. Dkt. No. 127. Former CZMI employees John Trefethen and Grant Schmid,
19 who now work for Topcon Healthcare Solutions ("THS") (founded in 2018), recruited the Former
20 Employees in 2018 and early 2019. Mr. Trefethen, Mr. Schmid, and Topcon knew that the Former
21 Employees possessed a wealth of CZMI Trade Secrets which would allow Topcon to quickly
22 launch a competing ODx product. This scheme was deliberate, calculated and unlawful.

23 The four senior Topcon employees involved with [REDACTED] at Topcon – John
24 Trefethen (Vice-President of Marketing and Product Design), Tobias Kurzke (Director of Software
25 Products), Keith Brock (Sr. Director of Global Product Management), and Genevieve Fay (Sr.
26 Director of Marketing) – all are former CZMI employees who worked with or oversaw Glaucoma
27 Workplace in some form at CZMI. They communicate constantly: at least weekly and sometimes
28 daily, according to Ms. Fay. *See* Elman Declaration in Support of Plaintiff Carl Zeiss Meditec,

1 Inc.'s Renewed Motion for Preliminary Injunction ("Elman Decl. 2"), Ex. 2, at 341:5-9; 378:3-6.
2 Mr. Trefethen recruited them all to Topcon.

3 After months of stonewalling, baseless objections, and contradictory statements, Defendants
4 have finally revealed the veracity of CZMI's claims. Mr. Kurzke, presently in charge of all of
5 Topcon's software ODx Products, [REDACTED]

6 [REDACTED]. See Kurzke Dep. Tr. (excerpts), at 93:7-14; 97:2-13, Dkt. No. 127-05
7 (provisionally filed under seal). He neither informed, nor sought permission from, CZMI. Mr.

8 Kurzke, then a CZMI Senior Product Manager, [REDACTED]

9 [REDACTED] See Kurzke Hard Drive File Listing, Dkt. No. 127-04

10 [REDACTED] He neither informed, nor sought permission from, CZMI. *Id.*

11 This occurred *four days after* he accepted Topcon's offer of employment, prior to giving notice to
12 CZMI of his departure, and two weeks before he left CZMI [REDACTED]

13 [REDACTED] Mr. Kurzke testified [REDACTED]

14 [REDACTED] after he joined Topcon. See Kurzke Dep. Tr. (excerpts), at
15 250:22-253:14, 311:10-312:11, Dkt. No. 127-05. Files on the Kurzke Hard Drive were accessed

16 less than two weeks prior to Topcon [REDACTED] See
17 Kurzke Hard Drive File Listing, Dkt. No. 127-04. This conduct directly violated state and federal
18 law and his TSCIP Agreement. See Kurzke Signed TSCIP Agreement, Dkt. No. 127-14.

19 The timeline is clear and indisputable. THS was founded in February 2018, Mr. Kurzke left
20 CZMI in April 2018 [REDACTED] Mr. Kurzke is given a six month
21 deadline to complete a product to compete with Glaucoma workplace that same month, Mr. Kurzke
22 drafts the Rev. A of Retina document in September 2018, and the first public announcement of what
23 has become [REDACTED] was submitted to the World Glaucoma Congress in October 2018:

24
25
26 REDACTED

1 In spite of all this, Defendants have continually denied these allegations and stonewalled
2 CZMI's attempts to enforce its rights. Indeed, they described the allegations —now substantiated by
3 their own evidence – as “a conspiracy theory.” Empl. Defs. Motion to Dismiss, Dkt. No. 49.
4 Defendants described Mr. Kurzke's now-admitted theft of CZMI Trade Secrets as “bald assumptions
5 and speculations, not actual facts.” Topcon's Motion to Dismiss, Dkt. No. 104. Topcon has
6 generically asserted it “lacks information to form a belief” regarding the theft and misappropriation
7 CZMI Trade Secrets in Mr. Kurzke's possession, which he used during his time at Topcon. Topcon's
8 Answer, Dkt. No. 122. Despite these attempts to skew reality, the facts now demonstrate that (i) Mr.
9 Kurzke, by his own admission, [REDACTED]
10 [REDACTED]; and (ii) Defendants were aware of the existence of [REDACTED] for nearly the entirety of
11 this litigation. Mr. Kurzke testified that he submitted [REDACTED] at the outset
12 of this litigation in summer 2019. *See* Kurzke Dep. Tr. (excerpts), Dkt. 127-5 (provisionally filed
13 under seal). Defendants have failed to substantively address CZMI's claims whatsoever during this
14 litigation despite being in possession of what courts in this District recognize as clear and convincing
15 evidence of trade secret misappropriation.

16 Topcon and the Former Employees refused to disclose the existence [REDACTED]
17 until January 13, 2020. CZMI had to move to compel Mr. Kurzke's deposition. *See* Dkt. Nos. 89,
18 95. Last week, when Defendants finally produced Mr. Kurzke for his deposition, [REDACTED]
19 [REDACTED]
20 Kurzke Dep. Tr. (excerpts), Dkt. 127-5 (provisionally filed under seal). Mr. Kurzke further admitted
21 that Topcon is attempting to break CZMI's “dominance” in the market through a product called
22 “Glaucoma Module” which he is developing that is remarkably similar to CZMI's Glaucoma
23 Workplace for which Mr. Kurzke served as the Product Manager. *See id.* CZMI's claims since the
24 inception of this litigation are finally being realized. Topcon's continued unlawful conduct must be
25 stopped.

26 **III. LEGAL STANDARD**

27 A plaintiff seeking a preliminary injunction must establish that (1) it is likely to succeed on
28 the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance

1 of the equities tips in its favor; and (4) an injunction is in the public interest. *Boardman v. Pac.*
2 *Seafood Grp.*, 822 F.3d 1011, 1020 (9th Cir. 2016) (citing *Winter v. Natural Res. Defense Council,*
3 *Inc.*, 555 U.S. 7, 20 (2008)).

4 Courts may “balance the elements of the preliminary injunction test . . . so that a strong
5 showing on one element may offset a weaker showing on another.” *Weride*, 379 F. Supp. 3d at 845
6 (N.D. Cal. 2019) (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)).
7 Accordingly, a preliminary injunction may be granted on a showing that serious questions are raised
8 and the balance of the hardships tips sharply in favor of the moving party. *Id.* In a matter involving
9 trade secret misappropriation, “courts in this district have presumed that Plaintiff will suffer
10 irreparable harm if its proprietary information is misappropriated.” *Comet Techs.*, 2018 U.S. Dist.
11 LEXIS 224356, at *13-14 (citing *TMX Funding, Inc. v. Impero Techs., Inc.*, No. C 10-00202 JF
12 (PVT), 2010 U.S. Dist. LEXIS 37064, at *24 (N.D. Cal. Mar. 18, 2010); *W. Directories, Inc. v.*
13 *Golden Guide Directors, Inc.*, No. C 09-1625 CW, 2009 LEXIS 52023, at *18-19 (N.D. Cal. June 8,
14 2009)).

15 Here, all four factors are satisfied. Irrefutable evidence showing Defendants’
16 misappropriation of CZMI Trade Secrets has come to light. Federal and state law ensure the
17 protection of trade secrets to prevent this exact conduct. Irreparable harm is virtually certain if
18 Topcon is not enjoined from launching their unlawfully developed product, and the public is served
19 by enforcing laws designed to protect trade secrets like CZMI’s. Accordingly, preliminary injunctive
20 relief is proper.

21 **LEGAL ARGUMENT**

22 **A. CZMI Is Likely to Succeed on the Merits of Showing Trade Secret** 23 **Misappropriation and Breach of Contract**

24 Under both federal and state law, establishing trade secret misappropriation requires proving
25 (1) a trade secret (*i.e.*, information which derives independent economic value from its secrecy and is
26 subject to reasonable efforts to maintain secrecy) exists; and (2) it was misappropriated (*i.e.*, it was
27 acquired, learned, used, or disclosed through improper, unlawful means by a party who knew that
28 acquisition or disclosure was unlawful and/or impermissible). *Waymo*, 2017 U.S. Dist. LEXIS 73843,

1 at *22-23 (citing 18 U.S.C. § 1839; Cal. Civ. Code § 3426.1). CZMI is likely to prevail under both
2 standards.

3 First, just like in *Weride*, *Comet Techs.*, and *Henry Schein* – recent cases in this District
4 concerning substantially similar issues – the information possessed by the Defendants qualifies as
5 trade secret. The information contains virtually everything used by CZMI to create their software
6 ODx Products. Mr. Kurzke admitted [REDACTED] contained all of the information he had while he
7 served as Senior Product Manager at CZMI. See Notice of Manual Filing, Dkt. No. 129. Based on
8 the very limited amount of documents produced from the Kurzke Hard Drive to date, the documents
9 include entire business plans, launch plans, marketing plans, strategy documents, pricing information
10 and sales data for CZMI products. Moreover, based on the file directory produced by Mr. Kurzke,
11 there are hundreds if not thousands more entire documents specifically pertaining to CZMI ODx
12 products contained on the Kurzke Hard Drive yet to be produced. *Id.* These file names match exactly
13 files of the same nature currently in the possession of CZMI. [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED] See Kurzke Hard Drive File Listing, Dkt. No. 127-
17 04. The information produced to date clearly qualifies for trade secret protection, and this is just the
18 tip of the iceberg of Defendants' improper possession of CZMI Trade Secrets, as Defendants have
19 only disclosed approximately 3% of these documents

20 CZMI undisputedly provided sufficient identification of the CZMI Trade Secrets so that the
21 Court and Defendants may ascertain the boundaries within which the trade secrets lie. See *Alta*
22 *Devices, Inc. v. LG Elecs, Inc.*, 343 F. Supp. 3d 868, 881 (N.D. Cal. 2018); *TMX Funding*, 2010 U.S.
23 Dist. LEXIS 60260, at *10; *Rockwell Collins, Inc. v. Wallace*, Case No. SACV 17-01369 AG (JCGx),
24 2017 U.S. Dist. LEXIS 190361, at *5 (C.D. Cal. Nov. 10, 2017). No Defendant has challenged the
25 highly detailed, 65-page trade secret disclosure produced by CZMI on December 12, 2019, listing
26 115 trade secrets related to Glaucoma Workplace and the CZMI FORUM software. CZMI Trade
27 Secret Disclosure, Dkt. 127-3; see also *Autodesk, Inc. v. Zwcad Software Co.*, No. 5:14-cv-01409,
28 2015 U.S. Dist. LEXIS 63610, at *14-15 (N.D. Cal. May 13, 2015); *Brocade Commc'ns Sys., Inc. v.*

1 *A10 Networks, Inc.*, 873 F. Supp. 2d 1192, 1214-15 (N.D. Cal. 2012) (“This type of information is
2 routinely given trade secret protection.”).

3 Second, CZMI takes reasonable efforts to maintain the secrecy of this information as detailed
4 in the Third Amended Complaint (“TAC”). Dkt. No. 127, at ¶ 51, Exs. 11-19, Dkt 127-13 – 127-17.
5 CZMI uses internal confidentiality policies, limits access to this information, executes confidentiality
6 agreements (*see* Dkt. 127-14), and conducts exit interviews. During these exit interviews, employees
7 are required to sign and acknowledge their confidentiality obligations and assent to not take CZMI
8 files. Mr. Kurzke signed this very agreement [REDACTED] *See* Elman
9 Decl. 2, Ex. 1. Courts in this District have found such measures appropriate efforts to maintain
10 secrecy. *See Comet Techs.*, 2018 U.S. Dist. LEXIS 224356, at *8-9 (having internal policies to protect
11 sensitive information non-disclosure agreements, limiting access, and conducting exit interviews that
12 stress departing employees’ confidentiality obligations, weighs towards finding reasonable efforts to
13 maintain secrecy). CZMI limits access to all of the information at issue in this case in a similar
14 manner as the successful plaintiffs in *WeRide*, *Comet Techs.* and *Henry Schein*. *See* Kurzke Dep. Tr.
15 (excerpts), Dkt. 127-5 (provisionally filed under seal); Fay Dep. Tr., Elman Decl. 2, Ex. 2, at 121:10-
16 122:21; 141:7-142:18; 143:10-145:4. It is undisputed CZMI adequately protects the asserted CZMI
17 Trade Secrets.

18 Third, CZMI will likely prevail in showing misappropriation as the trade secrets were acquired
19 improperly. Previously, the Court previously declined to find existing evidence of misappropriation
20 “compelling.” *See* Dkt. No. 75, at 8:10. Yet, at the same time Defendants represented to the Court
21 that CZMI’s claims were a “conspiracy theory,” they were in fact in possession of [REDACTED]
22 [REDACTED] *See* Kurzke Dep. Tr. (excerpts), Dkt.
23 127-5 (provisionally filed under seal). They refused to disclose the Kurzke Hard Drive, represented
24 to the Court and CZMI that the claims at-issue were unfounded, fought tooth and nail against
25 discovery (and still do), and now seek to downplay the reality that CZMI Trade Secrets are being
26 used to develop and launch Topcon products. Moreover, each individual Defendant was contractually
27 obligated to return any CZMI Trade Secrets – Mr. Kurzke had admittedly not done so to date. The
28 evidence already in the record is compelling, and a jury is likely to find in CZMI’s favor.

1 Indeed, courts have found [REDACTED] to be evidence of
2 misappropriation sufficient for a preliminary injunction. *See Weride*, 379 F. Supp. 3d at 845; *Comet*
3 *Techs.*, 2018 U.S. Dist. LEXIS 224356, at *12-13; *Henry Schein*, 191 F. Supp. 3d at 1077. Like in
4 those cases, here Mr. Kurzke had no right to [REDACTED]. It violated his TSCIP
5 Agreement to do so. *See Kurzke Signed TSCIP Agreement*, Dkt. No. 127-14. In fact, Mr. Kurzke
6 made direct misrepresentations to CZMI when leaving that he was not in possession of [REDACTED]
7 [REDACTED] during his employment with Topcon. *Compare*
8 *id. with Kurzke Dep. Tr. (excerpts)*, Dkt. 127-5 (provisionally filed under seal). Ms. Fay, his
9 current Topcon colleague, testified that she understood her confidentiality obligations to CZMI, and
10 therefore did not take anything. *See Elman Decl. 2, Ex. 2*, at 176:1-178:21; 192:20-24. She stated
11 she understood not to take information like that included on the Kurzke Hard Drive. *Id.* Mr.
12 Kurzke's theft and accompanying misrepresentation qualifies as "[a]cquisition of a trade secret by
13 improper means includes theft, bribery, misrepresentation, breach or inducement of a breach of a
14 duty to maintain secrecy, or espionage through electronic or other means." *See Chartwell Staffing*
15 *Servs. v. Atl Solutions Grp. Inc.*, No. 8:19-cv-00642-JLS-JDE, 2019 U.S. Dist. LEXIS 84723, at
16 *22-24 (C.D. Cal. Mar. 20, 2019) (citing *DVD Copy Control Assn., Inc. v. Bunner*, 31 Cal. 4th 864,
17 875 (2003)); *see also* 18 U.S.C. § 1839(6) (defining "improper means" in nearly identical manner).

18 In addition, [REDACTED]
19 [REDACTED] Kurzke Dep.
20 *Tr. (excerpts)*, Dkt. 127-5 (provisionally filed under seal). Yet, "[c]ourts have found that in similar
21 circumstances, deleting files from the computers allegedly used to misappropriate trade secrets is
22 evidence of the alleged misappropriation." *See Weride*, 379 F. Supp. 3d at 848 (citations omitted).
23 Thus, Mr. Kurzke's [REDACTED] does nothing to limit
24 his liability or demonstrate his innocence.

25 CZMI is likely to succeed on the merits. The existence of [REDACTED]
26 [REDACTED] and the circumstances surrounding his departure are all compelling
27 evidence. Permitting this [REDACTED] to go unabated would permit the very type of trade secret
28 misappropriation courts have enforced federal and state law to prevent. *See Comet Techs.*, 2018 U.S.

1 Dist. LEXIS 224356, at *9-10 (“A collection of data that allows the holder to recreate one of Plaintiff’s
2 top technologies derives its value from not being generally known, because Plaintiff’s competitive
3 edge would evaporate if the public and its competitors could easily recreate its products.”); *Eldorado*
4 *Stone LLC v. Renaissance Stone, Inc.*, Case No. 04cv2562 JM(LSP), 2005 U.S. Dist. LEXIS 45238,
5 at *10-12 (S.D. Cal. May 31, 2005) (finding misappropriation of a trade secret for preliminary
6 injunction purposes where information an employee copied showed the exact way that the plaintiff
7 made each of its products).

8 There are unanswered questions as to the extent and precise nature of Defendants’ use of [REDACTED]
9 [REDACTED] and CZMI Trade Secrets. However, injunctive relief is appropriate where a competitor is
10 poised to imminently release a competing product that would cause irreparable harm. *See Posdata*
11 *Co. v. Seyoung Kim*, Case No. C-07-02504 RMW, 2007 U.S. Dist. LEXIS 48359, at *26-27 (N.D.
12 Cal. 2007) (issuing TRO even where there were “serious questions” about whether the trade secret
13 information was actually used). CZMI is not required to prove its case at this stage. *Weride*, 379 F.
14 Supp. 3d at 848-49 (“At the preliminary injunction stage, WeRide must meet the high standard of
15 showing it is likely to succeed on the merits, but it is not required to prove its case.”). Continued
16 discovery will permit CZMI to do so, and an injunction will merely maintain the status quo in the
17 interim.

18 **B. CZMI Will Suffer Irreparable Harm**

19 CZMI will endure irreparable injury due to Topcon’s unfair development of a competing
20 product, which is slated for release in June or July 2020. Courts “presume that Plaintiff will suffer
21 irreparable harm if its proprietary information is misappropriated.” *W Directories*, 2009 U.S. Dist.
22 LEXIS 52023, at *18-19 (citing *Lillge v. Verity*, Case No. C 07-2748 MHP, 2007 U.S. Dist. LEXIS
23 73543, at *20 (N.D. Cal. Oct. 2, 2007)). Providing trade secrets to a competitor provides them with
24 any unfair advantage that cannot be remedied by monetary damages. *Waymo*, 2017 U.S. Dist. LEXIS
25 73843, at *36 (“It would likely be futile to attempt, after the fact, to estimate the monetary value of
26 injury suffered from either the loss of Waymo’s competitive position in this nascent industry or the
27 destruction of its trade secrets pertaining to the same. Monetary damages would thus be unavailable
28 to compensate for the irreparable harm threatened here.”).

1 No matter how Topcon attempts to spin the facts, Topcon poached Mr. Kurzke, [REDACTED]
2 [REDACTED] during his employment with
3 Topcon. See Kurzke Hard Drive File Listing, Dkt. No. 127-04. Topcon also convinced a number of
4 other former CZMI employees to join Mr. Kurzke at Topcon, including employees with senior
5 responsibilities [REDACTED] See TAC, at ¶¶ 1-16, 61-64. These Former
6 Employees, and many other Topcon employees who formerly worked at CZMI, now openly discuss
7 confidential CZMI product information, using it as the building blocks to create at least one
8 competing Topcon product. See TAC, at ¶¶ 80-118. This type of misappropriation is *per se* unlawful
9 in this District. *Waymo*, 2017 U.S. Dist. LEXIS 73843, at * 35-37.

10 Without an injunction, CZMI will have its market position irreparably eroded as Topcon's
11 knockoff products are launched this summer. See TAC, at ¶¶ 1-16, 52, 173-176. In trade secret cases,
12 injunctions are appropriate to prevent such irreparable harm. See *Lamb-Weston, Inc. v. McCain*
13 *Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991); *Comet Techs.*, 2018 U.S. Dist. LEXIS 224356, at *13-
14 14. Specifically, "[e]vidence of threatened loss of prospective customers or goodwill certainly
15 supports a finding of the possibility of irreparable harm." *Henry Schein, Inc. v. Cook*, 191 F. Supp.
16 3d at 1077 (quoting *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir.
17 2001)). The continued poaching of employees to accelerate Topcon's ability to compete with CZMI
18 creates greater irreparable harm with each employee who leaves CZMI. See *Waymo*, 2017 U.S. Dist.
19 LEXIS 73843, at * 35-36 ("[I]f defendants use Waymo's trade secrets to accelerate their own progress
20 . . . that momentum would improve their ability to attract investors and talented engineers away
21 from competitors – including Waymo itself.").

22 C. The Balance of Hardships Strongly Favors CZMI

23 Defendants will suffer no hardship if the injunction is granted. Defendants have no legitimate
24 use for nor ownership rights in CZMI's trade secrets or confidential information. The injunction
25 would simply require Defendants to abide by the law and, where applicable, their contractual
26 obligations to CZMI, such as their TSCIP agreements. See Kurzke Signed TSCIP Agreement, Dkt.
27 No. 127-14; see also *Henry Shein*, 191 F. Supp. 3d at 1077 (refraining from prohibited conduct is
28 not an undue hardship); *Pyro Spectaculars North, Inc. v. Souza*, 861 F. Supp. 2d 1079, 1092 (E.D.

1 Cal. 2012) (balance of hardships tips in favor of plaintiff seeking injunction when it “would
2 essentially only require [defendant] to abide by existing law regarding the unauthorized use of
3 another’s trade secret.”).

4 CZMI, on the other hand, has a very strong interest in ensuring there is no unauthorized
5 retention, disclosure, copying, or use of its trade secret information. Such actions would result in loss
6 of its competitive position and other competitive harms, for which monetary damages would be
7 inadequate. Moreover, CZMI is simply seeking to maintain the status quo by ensuring that the
8 confidentiality of its trade secret and proprietary information is preserved, and that this information
9 not be disclosed to or used by others. An injunction is the only means to obtain this assurance.

10 **D. The Public Interest Favors CZMI**

11 Finally, an injunction would support the public’s interest in protecting trade secrets and
12 intellectual property rights. *Comet Techs.*, 2018 U.S. Dist. LEXIS 224356, at *15. Protection of a
13 company’s trade secrets serves the public interest. *Henry Shein*, 191 F. Supp. 3d at 1078; *Bank of*
14 *Am., N.A. v. Lee*, No. CV 08-5546 CAS (JWJX), 2008 U.S. Dist. LEXIS 110410, at *22 (C.D. Cal.
15 Sept. 22, 2008) (“While California has a strong public policy in favor of competition, this interest
16 yields to California’s interest in protecting a company’s trade secrets.”). Courts have repeatedly ruled
17 that injunctions preventing the misuse of trade secrets are firmly in the public’s interest. *See, e.g.,*
18 *Pyro Spectaculars*, 861 F. Supp. 2d at 1093 (“[A]n injunction specifically focused on preventing
19 misuse of [Plaintiff’s] trade secrets . . . would serve the policy of protecting trade secrets while
20 simultaneously allowing lawful competition.”); *Henry Schein*, 191 F. Supp. 3d at 1078 (“Public
21 interest is also served by enabling the protection of trade secrets.”). CZMI’s trade secrets are no
22 different. As these courts have done, CZMI respectfully requests that this Court find the injunction
23 to be in the public interest and the interest of companies in this District, like CZMI, dependent on
24 trade secret protection to defend their proprietary information.

25 **IV. INJUNCTION BOND**

26 In accordance with Fed R. Civ. P. 65(c), which “invests the district court with discretion as to
27 the amount of security required, if any,” *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003),
28 CZMI is willing to file an injunction bond upon the Court’s grant of an injunction against Defendants.

1 Notably, Defendants will in no way be prejudiced from the narrowly tailored injunctive relief sought
2 in this case. Defendants have expended little time and investment in developing their forthcoming
3 products. In contrast, CZMI has spent over a decade developing, refining and innovating. The short
4 time it will take to uncover the truth of this matter is minimal compared to the relative risk and harm
5 to CZMI and the entire ophthalmic industry.

6 **V. CONCLUSION**

7 For the above stated reasons and the allegations in the TAC, CZMI respectfully requests that
8 the Court issue a preliminary injunction:

- 9 (1) ordering all Defendants to immediately cease and desist disclosure CZMI Trade
10 Secrets to Topcon or any other entity;
- 11 (2) enjoining all Defendants from using any CZMI Trade in their work on any product at
12 Topcon;
- 13 (3) enjoining Topcon from releasing [REDACTED]
14 [REDACTED] until at least the resolution of this case
15 and/or the issuance of a permanent injunction if CZMI succeeds on the merits; and
- 16 (4) ordering any alternative or additional relief as the Court may deem appropriate.
- 17 The Preliminary Injunction should be immediately effective upon entry without prejudice for CZMI
18 to request further relief if appropriate.

19
20
21 Dated: February 5, 2020

Respectfully Submitted,

WHITE & CASE LLP
/s/ Jeremy T. Elman

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